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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 187

WILLIAM E. BODE, ET AL.,

Appellants,

vs.

EDWARD J. BARRETT, AS SECRETARY OF THE STATE OF ILLINOIS, ET AL.,

Appellees.

BRIEF FOR APPELLANTS.

SCOTT W. LUCAS,
CHARLES A. THOMAS,
JACK ARNOLD WELFELD,
Counsel for Appellants.

HUGH J. GRAHAM, JR.,
Of Counsel.

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BRIEF FOR APPELLANTS.

I.

THE OPINION IN THE COURT BELOW.

The opinion in the Supreme Court of Illinois is reported in 412 Illinois Reports, 204; 106 North Eastern (2d) 1952, and appears at pages 268-293 of the Record.

II.

JURISDICTION.

Jurisdiction to review this case is based upon Subsection (2) of Section 1257 of Title 28 of the Judicial Code of the United States.

III.

STATEMENT OF THE CASE.

This is an appeal from a final decree of the Supreme Court of Illinois sustaining the validity of the 1951 Motor Vehicle Law of Illinois. The appellants brought an action in the Circuit Court of Sangamon County, Illinois, as citizens and taxpayers of the State of Illinois on behalf of themselves and all other taxpayers of the State pursuant to the Statute (Ill. Rev. Stat. 1951, Ch. 102, Pars. 11-16) authorizing suits in equity by taxpayers in proper cases to restrain the reimbursement of public money by officers of the State and to enjoin such officers from expending public funds in the administration or enforcement of the Act. The complaint alleged that the statute was unconstitutional and void in that it violated certain provisions of the Constitution of the State of Illinois, as well as Article 1, Sec. 8; Article 1, Sec. 10; and Amendment XIV of the Constitution of the United States (R. 1-18).

The Circuit Court of Sangamon County, Illinois, after hearing the evidence, declared unconstitutional and void the Act of the 67th General Assembly, approved by the Governor of Illinois on July 9, 1951 entitled, "An Act to amend Sections 9, 11a and 20 and to repeal Sections 9b, 9c, 9d, 9e, 9f, 9g, 9h, 9i, 9j, 9k, and 9l of the 'Motor Vehicle Law' approved June 30, 1919, as amended," and enjoined and restrained the Secretary of State, the Auditor of Public Accounts, and the Treasurer of the State of Illinois from expending public funds in the administration and enforcement of said Act.

Prior to the enactment of the Amended Motor Vehicle Law, hereinafter sometimes referred to as the 1951 Amendment, the Illinois Motor Vehicle Law provided flat taxes

for motor vehicles carrying goods and carrying more than seven passengers. In addition thereto, it also provided for an optional mileage tax based on the amount of use of the highways. Under the former provisions of the Act the highest flat tax imposed was $420 (Ill. Rev. Statutes 1951, Ch. 95½, Secs. 9 and 10a).

The Statute in question (Laws of Illinois, 1951, p. 1147) imposed a substantially increased flat tax, the highest tax being $1134 for 1952 and 1953, and $1588 for 1954 and succeeding years. The Statute, likewise, repealed the mileage option provisions which formerly existed and changed some classifications while omitting other classes of vehicles, such as non-freight carrying vehicles and 4 wheel freight-carrying vehicles varying in weight from 30,000 to 36,000 pounds. A new class of 2 axle busses operating entirely within a single municipality or a single municipality and municipalities contiguous thereto, "or a close radius thereof" was subjected to a substantially lower tax. While the 1951 Act contained an agricultural exemption, as did the former Act, it also created new classes assessing different taxes where such classes by very definition are indistinguishable (Secs. 9 (i-3) and 9 (l-4)).

The 1951 Amendment further exempts vehicles from states having reciprocity with the State of Illinois as well as authorizing reciprocal agreements. Semi-trailers, under the Act, are treated as one vehicle with the tractor unit, except that additional semi-trailers are licensed at $5 per annum. The taxes are based upon the weight of a vehicle and its maximum load, although this latter qualification is nowhere defined nor is there any relation between the tax assessed and the amount of highway use.

In paragraph 6(d) of the original complaint, the petitioners raised the issue of the repugnancy of this Statute to the Constitution of the United States (R. 7). The Con-

stitutional issue as well as the effect of the Act on Interstate Commerce was clearly recognized throughout the opinion of the Supreme Court of Illinois (R. 268-293).

The imposition of a substantially increased and graduated tax based upon weights and bearing no uniform relation to the use of the particular taxpayer or its vehicle to the highways is the result achieved under the new Act with the repeal of the optional mileage provisions thereof. A resident of the State of Illinois hauling his own products to market for sale would pay a substantially high tax, whereas a commercial non-resident carrier operating from a State having a reciprocal agreement with the State of Illinois would pay no tax at all. Had the optional mileage features of the Act been retained, this discrimination would not exist.

IV.

SPECIFICATION OF ERRORS.

1. The Supreme Court of Illinois erred in holding that the state may impose a burden or obstruction upon interstate commerce by exacting high flat annual taxes on trucks and busses engaged in such commerce based upon the relation between total fees collected and total cost of the highways as distinguished from the established basis of a reasonable relation of the tax upon users and classes of users to the privilege of using such highways.

2. The Supreme Court of Illinois erred in holding that the state may extend its confiscatory and prohibitory powers as to use of the highways (a power commonly held to extend to prohibition of carriers for hire who have only a privilege of use), to persons engaged in interstate commerce who carry their own property and have a right to use the highways.

3. The Supreme Court of Illinois erred in holding that the state may impose prohibitory privilege taxes on use of the highways irrespective of whether such highways are built and maintained solely by the State of Illinois or jointly with the United States and without regard to whether such privilege taxes bear any reasonable relation to use of the highways by persons engaged in interstate commerce.

4. The Supreme Court of Illinois erred in ignoring the evidence as to difference in use of the highways by different classes of carriers engaged in interstate commerce and in ignoring differences in use engendered by natural facts such as the limitation upon agricultural hauling and in ignoring legal restrictions upon use of highways by different classes of carriers.

5. The Supreme Court of Illinois erred in holding that the high flat annual tax (top tax $1,588) may lawfully be imposed upon some persons engaged in interstate commerce and may at the same time completely exempt other persons of the same type engaged in the same interstate commerce over the same route, in holding that residents of Illinois and residents of the 17 states with which the State of Illinois has no reciprocity must pay the tax whereas residents of states with which the State of Illinois has reciprocity need not pay any tax no matter how much use is made of Illinois roads, and notwithstanding that the highest tax in such other states varies greatly and in most cases is several times lower than that of Illinois.

6. The Supreme Court of Illinois erred in holding that the authority given to the Secretary of State of Illinois to enter into reciprocal agreements with other states and shown to have been exercised by entering agreements of varied kinds (*e. g.* giving free operation to California vehicles in Illinois, although Illinois vehicles pay 3% of

gross revenue earned in California, distinguishing reciprocity as to kinds of fuel used by vehicles, distinguishing operation as to irregular or scheduled route) amounted merely to recognizing existing facts and did not constitute an interference with interstate commerce and did not constitute the entering of an agreement or compact among the states without the consent of congress in violation of the prohibitions in Sections 8 and 10 of Article I of the Constitution of the United States.

7. The Supreme Court of Illinois erred in overruling the contention of appellees that the operation of the Act on trucks from 17 non-reciprocal states is an obstruction to interstate commerce and that the act inevitably creates "trading areas" and "trade barriers" resulting from different treatment of persons depending solely on their domicile, route, or the discretion of a secretary of state in violation of the letter and spirit of Section 8 of Article I of the Constitution of the United States.

8. The Supreme Court of Illinois erred in holding that a state may tax its own citizens for the privilege of use of the highways without regard to how much or how little licensees take advantage of the privilege conferred in thus ignoring the law that citizens of Illinois have as much right to protection in respect to interstate commerce as to citizens of any other state.

9. The Supreme Court of Illinois erred in denying petitioners-appellees' contention that the Act creating the tax ignored the most obvious division as to use of highways by motor vehicles, that is to say, the difference in use between the class of fixed route, scheduled, line haul common carriers and the class of private truck owner, local carrier, contract carrier, and specialized carrier, and:

(a) bears no fair relation to the privilege granted, and

(b) has no other consistent theme of classification, in

consequence whereof it is discriminatory and arbitrary (and confiscatory as to some) in violation of the XIVth Amendment to the Constitution of the United States.

10. The Supreme Court of Illinois erred in denying petitioners-appellees' contentions that the operation of the law in the omission of classes of vehicles, the creation of a class operating in a municipality or municipalities "or a close radius thereof" without defining the terms, basing the tax on "maximum load" without defining the same, the creation of an indefinite agricultural exclusion, and the creation of other confusing and indefinite classifications constituted a denial of due process and equal protection of the law in violation of the XIV Amendment to the Constitution of the United States.

11. The Supreme Court of Illinois erred in denying petitioners-appellees' contention that the statute in question resulted in a cumulative burden on interstate commerce.

12. The Supreme Court of Illinois erred in failing to hold the Act to amend Sections 9, 11a and 20 of the Motor Vehicle Law and repeal other Sections stated therein (Laws of Illinois 1951 p. 1147) unconstitutional and void as contrary to Sections 8 and 10 of Article I of the Constitution of the United States.

13. The Supreme Court of Illinois erred in failing to hold the Act to amend Sections 9, 11a and 20 of the Motor Vehicle Law and to repeal other sections stated therein (Laws of Illinois 1951 p. 1147) unconstitutional and void as contrary to the XIVth Amendment to the Constitution of the United States.

14. The Supreme Court of Illinois, although holding that all questions presented were properly raised by petitioners under its own holding in *Krebs* v. *Thompson*, 387 Ill. 471 (concerning Ill. Rev. Stat. 1951, Chap. 102, pars. 11-16),

referred to in the opinion in the case herewith appealed from, did also err by reason of the erroneous holdings concerning the rights of the petitioners under the Constitution of the United States in failing to examine into the full effect of the statute in question upon various classes of highway users both in interstate and intrastate commerce for the reason that said court held such matters to be immaterial.

SUMMARY OF ARGUMENT.

1. The 1952 Amendment to the Motor Vehicle Law of Illinois established unreasonable and discriminatory taxes wholly unrelated to the use or privilege granted.

2. Section 20 of the 1951 Amendment violated Amendment 14 of the Constitution of the United States by discriminating against certain parties and by creating a burden on interstate commerce.

3. The 1951 Amendment constitutes an unlawful delegation of legislative power in that it authorizes the administrative officers to determine which vehicles operate within a close radius for tax purposes, and in permitting nonresident interstate carriers to operate their vehicles tax free while resident local carriers are required to pay oppressive taxes.

4. The Supreme Court of Illinois failed to consider the constitutional requirement that a substantial tax for revenue must bear a reasonable relationship to the use of the highway.

ARGUMENT.

Point I.

THE 1951 AMENDMENT ESTABLISHED AN OPPRESSIVE, UNREASONABLE AND DISCRIMINATORY TAX AGAINST PRIVATE CARRIERS WHOLLY UNRELATED TO USE.

The Motor Vehicle Law of Illinois classifies vehicles under Section 2 of the Act into two divisions. The first division embraces vehicles designed for carrying less than seven passengers while the second division consists of vehicles used for carrying more than seven passengers and vehicles for hauling freight, such as trucks, tractors, busses, trailers, and the like.

The optional mileage feature introduced by the 1935 Amendment to the Motor Vehicle Act was repealed by the Act now under consideration. Prior to the 1951 Act, this provision enabled a licensee thereunder to be taxed by the number of miles actually travelled within the state. Vehicle operators thus had the option of paying such a tax, which was directly related to the specific amount of use of the highways, or, in the alternative, could pay a license fee under the annual flat tax rates. These license fees were required to be placed in a special "road fund" to be used for the construction, maintenance, and patrolling of the Illinois Highway System (Sec. 36 of the Motor Vehicle Law, Ill. Rev. Stat. 51, Ch. 95½, Sec. 36).

In substance, the 1951 amendment to the Motor Vehicle Law brought about three distinct changes:

1. A substantial increase as of January 1, 1952, in the annual flat license fees for vehicles of the second division with provision for further increases as of January 1, 1954.

2. Repeal of the optional mileage weight tax.

3. Creation of a new classification of two axle busses with shock absorbers subject to Illinois Commerce Commission Regulation operating in municipalities or a close radius thereof, with no substantial license increase as to such classification.

It is noteworthy that throughout its opinion, the Supreme Court of Illinois alludes to and recognizes the fact that there must be a reasonable relation between a tax and the privilege granted, namely, the use and enjoyment of the highways. In support of such proposition, the court stated,

> "There was no constitutional inhibition against more than one privilege or excise tax where the total does not exceed reasonable taxation for the privilege enjoyed. It is incumbent upon plaintiffs to show that the aggregate charge bears no reasonable relation to the privilege granted. *People* v. *Deep Rock Oil Corp.*, 343 Ill. 388" (R. 279).

Again, adopting the language of *Hendrick* v. *Maryland*, 235 U. S. 610, which the court refers to as the leading case on the right of the State to tax motor vehicles in interstate commerce,

> "* * * The amount of the charges and the method of collection are primarily for determination by the state itself; and so long as they are reasonable and are fixed according to some uniform, fair, and practical standard, they constitute no burden on interstate commerce * * *" (R. 280).

Although the Supreme Court of Illinois cited the case of *Dixie-Ohio Express Co.* v. *State Revenue Commission*, 306 U. S. 72, as authority for the proposition that to sustain the validity of a tax it is not essential to show that its proceeds be actually appropriated to highway purposes or that its use of the highways is not enough to warrant the tax if the privilege therefor is sufficient, it should be

noted that the tax was necessarily required to be a reasonable compensation for the privilege of using the highways. Moreover, the tax involved in that case was $75 for the heaviest weight with lesser rates of tax for vehicles not used for hire. Noteworthy of mention, also, is the fact that the State Supreme Court of Georgia in the *Dixie-Ohio Express Co.* case found that a rational basis for the classification readily appeared (186 Ga. 228, 235).

In *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, cited in the opinion of the Supreme Court of Illinois (R. 283), there was no question raised as to the reasonableness of compensation for road use nor was the tax imposed an annual tax, but merely applied to busses wherein the formula rather than the amount of the tax was being challenged. In a vigorous dissent by Mr. Justice Frankfurter and Mr. Justice Jackson, it was pointed out that the constitution has and usually requires a valid formula and a reasonable tax.

Certainly, the exorbitant increase brought about by the 1951 Act bears no relation to the principles enunciated in the above decisions and this Amendment must necessarily fail because it imposes arbitrary and discriminatory taxation.

Under the principles of due process where a tax is imposed for revenue purposes such tax must bear a fair relationship to the general character of the use of a highway, and this failure to recognize the basic differences in the average mileages of different classes of users necessarily renders the 1951 Amendment unconstitutional and void.

Since the private carrier has an absolute right to the use of the highways and a carrier for hire has a qualified and restricted use, such differences must be recognized if the validity of this tax is to be sustained. Many farmers, small

merchants and truckers travel only 3,000 miles annually, whereas common carriers travel as much as 90,000 miles annually, yet the latter under reciprocal agreements, are afforded the use of Illinois highways tax free while the former, who already have paid an *ad valorem* tax on their farm, store, or factory, pay an exorbitant tax under this amendment. Such disparity is not easily reconciled with the requirements of due process of law.

There is no doubt that a common carrier may be taxed at a higher rate than a private carrier. See *H. P. Welch Co.* v. *State*, 89 N. H. 428, 306, U. S. 79; *Pure Oil Co. v. Oklahoma Tax Commission*, 179 Okla. 479, 302 U. S. 635. Similarly, this Court has approved the imposition of a mileage tax proportioned to the use of a highway. *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183.

Prior to the 1951 Amendment, the highest tax under the Act was $420, while it is now $1588, nearly 400 per cent greater. The optional mileage tax provided an alternative tax which obviated the discriminatory result now existing and its repeal completely obliterated any safeguards against unreasonable taxation under the 1951 Amendment.

In *Ott* v. *Mississippi Valley Barge Lines, Co.*, 336 U. S. 169, this Court reiterated the doctrine of tax apportionment applicable to the rolling stock of railroads in interstate commerce, formulated in *Pullman Car Co.* v. *Pennsylvania*, 141 U. S. 18; Mr. Justice Douglas speaking for the Court, at page 174, stated:

> "So far as due process is concerned, the only question is whether the tax in practical operation, has relation to opportunities, benefits, or protection conferred or afforded by the taxing state; see *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444, those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the state."

It thus becomes apparent that no taxing body may impose arbitrary and discriminatory taxes which bear no relationship to the use so taxed. An examination of the charts appended to the record in this case (R. 218-225) setting forth the variation in the amount of taxes imposed on vehicles of the same weight bears out this principle and clearly demonstrates the repugnancy of this Statute.

Point II.

SECTION 20 OF THE ACT VIOLATES ARTICLE 1, SECTION 8 OF THE CONSTITUTION OF THE UNITED STATES AND AMENDMENT XIV, SECTION 1 OF THE CONSTITUTION OF THE UNITED STATES.

The petitioners contend that the XIVth Amendment of the Constitution is violated by Section 20 of the 1951 Act in the following respects:

1. The operation of the tax on "non-residents" whose states require Illinois residents to pay taxes results in a cumulative burden upon Interstate Commerce and a discrimination between carriers in Interstate Commerce.

2. The operation of the tax on "resident" owners discriminates against "residents" in favor of "non-residents", in Interstate Commerce where the State of the "non-resident" exempts Illinois residents from its taxes.

3. Unless exemption of non-resident owners offers the alternative of a mileage set basis or other out basis, it will discriminate against parties engaged in Interstate Commerce depending upon where such parties do business.

4. Section 20 of the Act discriminates against foreign corporations, partnerships or individuals "doing business in the State" in favor of those not "doing business in this State" and discriminates in favor of foreign corpora-

tions doing business in the State and against residents in Interstate Commerce and otherwise.

5. Section 20 of the Act creates a cumulative burden on Interstate Commerce as to many carriers from States where no reciprocity is allowed.

6. Section 20 enables the Secretary of State of Illinois to arbitrarily impose a burden on Interstate Commerce as to classes of vehicles and types of commerce.

Section 10, Article I of the Constitution of the United States forbidding compacts and agreements without the consent of Congress by authorization and execution of reciprocal agreements is further violated in that it creates trading areas and trade barriers as well as infringement of the authority of Congress in reference to an economic policy existing since the inception of the Constitution. A further burden on Interstate Commerce arises as a result of the arbitrary disarrangement and confusion in Interstate Commerce brought about by the classification under the 1951 Amendment. A substantial burden on Interstate Commerce further results from a cumulative effect of taxes imposed by non-reciprocal States since no method is provided for establishing a fair relationship between the use of the highways, the license charge therefor and the Interstate Commerce carried on by the individual trucker or class of truckers.

Point III.

THE 1951 AMENDMENT CONSTITUTES AN UNLAWFUL DELEGATION OF LEGISLATIVE POWER.

The 1951 Amendment to the Motor Vehicle Act created a new classification for two axle busses by Section 9(1)(7):

"Two axle vehicles which are designed and used for transporting more than seven passengers entirely

within the territorial limits of a single municipality and municipalities contiguous thereto, or a close radius thereof, are equipped with hydraulic shock absorbers and whose rates for transportation are subject to the regulation of the Illinois Commerce Commission, a tax at the following rates:"

There follows this schedule:

12,000 to 14,000 pounds	$ 45.00
14,000 to 16,000 pounds	70.00
16,000 to 20,000 pounds	105.00
20,000 to 24,000 pounds	145.00
24,000 to 36,000 pounds	195.00

Any bus which can qualify for this class will pay the same tax that it is now paying on the above weights while the tax on all other vehicles, except semi-trailers, increases substantially in 1952, 1953 and again in 1954. The word "municipality" is wholly indefinite and tantamount to practically complete discretionary action by the administrative officer. Similarly, there is no standard by which the administrative officer shall construe the term "or a close radius thereof". The Act does not provide whether a close radius shall be deemed to cover an area of 3 miles, 5 miles or 50 miles, nor does it specify whether "close radius" refers to a close radius of the original municipality or of the contiguous municipalities. The significance of the issue raised by this terminology is this. If a 31,000 pound bus is within the "close radius" of the "municipality", the tax is $195 whether it has four wheels or six wheels on its "2 axles". If the bus is not within a "close radius" or a "municipality" the tax is $545, if it is a four wheel vehicle and $810 if it is a six wheel vehicle. This is much more than a minor administrative rule for it delegates authority to an administrative office to vary the tax from $195 to $810 on the same vehicle.

This was an intentional classification and as such affects the whole classification for tax purposes.

The 1951 Amendment further constitutes an unlawful delegation of legislative power which is prohibitive, in that it authorizes the Secretary of State to enter into agreements with other States, permitting the operation of vehicles without registration or the paying of permit fees or flat taxes. There is no valid basis for establishing the right of an interstate carrier to enjoy the use of Illinois highways without compensating the State for the benefits thereof, while a resident operating only a fractional portion of the mileage in contrast to the Interstate carrier should be subjected to a tax so great that he cannot afford to operate his vehicle. Had the optional mileage features of the Act been retained this discrimination would not result. It was therefore incumbent upon the legislature to provide for either a mileage weight election or some other formula fairly related to the use of the vehicle on the highways.

Section 20 of the 1951 Act further violates Section 8 of Article I of the Constitution of the United States by authorizing agreements between States without the consent of Congress.

A statute which creates a competitive advantage to one over another where each is in the same business is the essence of unconstitutional arbitrary discretion. The non-resident carrier from a non-reciprocal State suffers the same competitive disability as Illinois resident carriers in contrast to non-resident carriers from reciprocal States. While it has already been established that a non-resident cannot be more heavily taxed than a resident carrier, since a tax must bear a reasonable relation to the privilege of use granted (See *Hendrick* v. *Maryland*, 235 U. S. 610), the converse of such a situation now exists; the non-resident pays no tax in Illinois while the resident carrier pays an exorbitant tax to maintain the highway for his competitor. This burden upon Interstate Commerce resulting from the

1951 Amendment could have been obviated had the mileage weight provisions of the prior enactment been retained.

In *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183, involving a tax on a passenger carrier for hire amounting to $500 where a maximum tax for the class was $750, this Court declared such a tax invalid on the ground that it was a tax on the privilege of engaging in Interstate business and not as compensation for the use of the highways. Again in *Ingels* v. *Morf*, 300 U. S. 90, a freight tax of $15 for 90 days was declared invalid as excessive in amount for regulatory purposes. These taxes were inconsequential in comparison to the prohibitive taxes imposed by the 1951 Amendment. The new Illinois law fails to provide any fair relationship between the amount of the tax and the use of the highways.

In *Prouty* v. *Coyne* (DC.-S. D.), 55 Fed. (2) 289, where calculated fees ranging from $15 to $400 predicated upon weights were involved, the Court said:

> "In the instant case it appears that a number of plaintiffs engaged in Interstate Commerce make only occasional and infrequent trips though necessary over the South Dakota highways, yet are required under the Statute to pay the same amount of tax, if such trips exceed 4 in number as those who may be constantly using the highways. As to those engaged in Interstate Commerce, the Act would be held unconstitutional". *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183; *Sprout* v. *South Bend*, 277 U. S. 163.

In *Western Livestock* v. *Bureau*, 302 U. S. 350, this Court stated at page 255:

> "The vice characteristic of those (taxes) which have been held invalid is that they have placed upon the commerce burdens of such a nature as to be capable, in point of substance, of being imposed (citing cases) or added to (citing cases) with equal right by every State which the commerce touches, merely because interstate

commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce (citing cases)."

In the recent opinion of this Court in *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, the appendix (p. 561) sets forth an analysis of decisions involving the taxation of motor vehicles in interstate commerce by the various States. Eleven of the 15 decisions which were held valid involved taxes of $10, $18, $200, 1¢ per mile, 5/10ths mill per gross ton mile, $15, $25, $75, $400 and $15 and $25 respectively for periods of six months. The two cases involving the largest amounts ($200 and $400) were imposed upon carriers for hire. In Illinois, under the 1951 Amendment, the tax upon carriers for hire and not for hire has a top bracket of $1,588, so that it appears that none of the States have ever enacted a tax as exorbitant as the one now in existence and operating indiscriminately upon carriers for hire and not for hire whether in intrastate or interstate commerce.

To demonstrate the absence of any rational basis for the oppressive increases brought about by the 1951 Amendment, we need only to look at the following examples:

Harold Thibo, a trucker (59,000 pound truck) travelling 1,480 miles within the state and 57,400 miles out of state paid a flat tax of $48.30. Under the 1951 Amendment he will be required to pay a tax of $1,245.00; representing a percentage increase of 2577% (R. 138; Pl's. Ex. 68, at p. 219).

Hillard Waller (G and W Truck Lines), a non-resident contract carrier operating three trucks, one of which weighed fifty thousand pounds, paid a tax of $8.80 under the former Act, for two trips into the State of Illinois; under the present law that tax will be $1,098.00, representing an increase of 12477%. On two forty-one thousand pound vehicles operated by Waller, he paid $9.00 and $8.80, respectively, on two trips to Illinois, whereas under the

new Act his taxes will amount to $890.00 on each of such vehicles, representing an increase of 9888% and 10113%, respectively (R. 170, 172; Pl's. Ex. 68 at p. 219). These increased taxes must be paid even though Waller makes only one trip into the State of Illinois. It must be borne in mind that Waller, an interstate contract carrier, enters the State only pursuant to the request of some shipper. Nevertheless, he is subjected to the burdensome and oppressive taxes outlined herein.

Point IV.

THE SUPREME COURT OF ILLINOIS DID NOT CONSIDER THE CONSTITUTIONAL REQUIREMENT THAT A SUBSTANTIAL TAX FOR REVENUE MUST BEAR A REASONABLE RELATIONSHIP TO THE USE OF THE HIGHWAY.

The Illinois Supreme Court erroneously concluded that so long as the amount of taxes imposed did not exceed the cost of constructing and maintaining the highways, it was not burdensome, oppressive or discriminatory. Such a theory evades and abandons the constitutional requirement that a substantial tax must bear a reasonable relationship to the use of the highway by the class of the user.

The private carrier has an absolute and inherent common law right to the use and enjoyment of the highways. Such a right cannot be made the subject of confiscatory, oppressive, discriminatory and burdensome license fees, even though the total of such taxes collected therefrom is not in excess of the amount required to maintain a highway system. To hold otherwise would be wholly inconsistent with the constitutional requirements of due process of law. The absolute right of a private carrier to use the highways is so fundamentally rooted in our system of free enterprise that many states wholly exempt such classes and elect to place the entire burden of the cost of highway maintenance upon common carriers for hire. Since this latter class does

not pay an *ad valorem* or property tax within the state, but carries the goods of others exclusively for hire, this has been deemed a privilege, subject to restriction or even abolishment. See *Dixie-Ohio Express Co.* v. *State Revenue Commission, supra; Pure Oil Co.* v. *Oklahoma Tax Commission, supra; H. P. Welch Co.* v. *State, supra.* The taxes imposed against carriers for hire must not be arbitrary or in excess of the cost of constructing and maintaining the highways, but must be fairly uniform. Since the carrier for hire has a qualified or restricted use of the highways, it is taxed for the privilege of doing business, and as such the tax imposed may be burdensome and oppressive, in contrast to such taxes as are imposed upon private carriers. Frank M. Barker, Chief Highway Engineer of the Department of Public Works and Buildings, a witness for the State, testified that damage to roads was not taken into consideration (R. 109).

A review and examination of the authorities cited in the opinion of the Supreme Court of Illinois does not sustain the view that the tax under the 1951 Amendment is either constitutional or reasonable. In *Hendrick* v. *Maryland,* the tax range varied from $6 to $18 and the question involved therein pertained to the regulatory power of a state to require the licensing of all vehicles and the issuance of certificates for limited use to interstate carriers. *Kane* v. *New Jersey,* 242 U. S. 160, involved a tax for the use of facilities which varied from $3 to $10. *Clark* v. *Poor,* 274 U. S. 554, sustained the imposition of an extra tax against carriers for hire and although the amount was not in issue, the tax therein concerned varied from $20 to $200. In *Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245, interstate passenger carriers for hire were taxed at one cent a mile and while the formula differed from the previous 3% of the gross receipts levied on intrastate carriers, no great disparity was shown and hence it was held

constitutional. In sustaining the tax imposed in *Hicklin* v. *Coney,* 290 U. S. 169, on carriers for hire moving in interstate commerce, it should be noted that the tax varied from $30 to $400, was not questioned, and the opinion sustained the exemption of farmers and dairy men who occasionally but not regularly transport farm and dairy products for compensation. *Morf* v. *Bingaman,* 298 U. S. 407 sustained a permit fee of $5 to $7.50 for vehicles transported for sale whether towed or driven. A lower tax for vehicles not for hire was sustained in *Dixie-Ohio Express Co.* v. *State Revenue Commission, supra.*

In *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission,* 295 U. S. 285, an annual fee of $25 on contract carriers for hire was approved as moderate and reasonable, even though such carriers did not use the highways as much as other carriers in local business. The more recent case of *Capitol Greyhound Lines* v. *Brice,* 339 U. S. 542, held that the formula of a tax need not be constitutional so long as the amount did not exceed fair compensation for the use of the road. The tax therein was 2% of the value of the vehicle, nor was that issue involved since the tax was not unreasonable in amount.

The only case cited by the Supreme Court of Illinois that would seem to lend any support to its position is *Eavey Co.* v. *Department of Treasury of Indiana,* 216 Ind. 255. There, the court upheld a tax imposed upon resident private carriers in interstate business at the same rate as that which was imposed upon carriers for hire. The court adopted the view that while a private carrier could be exempted, the State was not precluded from taxing it with carriers for hire. On appeal, the case was dismissed for want of a substantial federal question.

It is submitted that this case is not controlling and is readily distinguishable upon the following grounds: no

evidence was introduced of the mileage travelled by the plaintiff; there was no showing as to the use of the highway by the private and the common carrier; the amount of the tax paid was not shown, nor was it challenged. Unlike Illinois, the highest tax that could have been imposed under the Indiana law was $400, which has since been amended to provide a maximum tax of $200 on trucks and $300 on tractor semi-trailers. A review of the foregoing cases aptly demonstrates that the amount of tax imposed was not in issue but rather was the formula or application of the tax challenged. Moreover, the taxes in the preceding cases were relatively small in contrast to the $1,588 imposed under the 1951 Amendment on both private and common carriers. While we recognize that a regulatory tax may be justified upon all carriers as a class, nevertheless, when a substantial tax for revenue is imposed it must bear a reasonable relationship to the character of the use.

We submit that the 1951 Amendment constitutes legislation devoid of a rational basis. The petitioners' challenge thereto is predicated upon the ground that the amount of the tax imposed is in excess of fair compensation for the privilege of using the Illinois highway system. See *Capitol Greyhound Lines* v. *Brice, supra.* Regardless of the benefits Illinois resident carriers are afforded by other states under reciprocal agreements, a tax on the resident farmer or other small trucker hauling his own products to market over short distances cannot be sustained where it is so oppressively high as to bear no relationship to the privilege granted.

This Court, in the *Brice* case, referring to *Kane* v. *New Jersey,* 242 U. S. 160, at page 545, stated:

> "* * * that so long as fees are reasonable in amount, it is clearly within the discretion of the State to determine whether the compensation for the use of its

highways by automobiles shall be determined by way of a fee, payable annually, or semi-annually, or by a toll based on mileage or otherwise.

* * * a flat fee on the privilege of using the highways 'is not a forbidden burden on interstate commerce' unless 'unreasonable in amount'." *Morf* v. *Bingaman,* 298 U. S. 407, 412.

Again, at page 545 of the *Brice* opinion, this court stated:

"The Maryland tax based on the cost of the vehicle should be judged by its result, not its formula, and must stand unless proven to be unreasonable in amount for the privilege granted."

Without laboring the point, suffice it to say, that this court in cases involving very nominal taxes has never departed, but on the contrary, has consistently held that the reasonableness of a tax to the privilege or use granted is decisive in these matters.

It is conceded, *arguendo,* that the fact that a tax is so high as to discourage, prevent or even force a licensee thereunder from carrying on his business, does not, of itself, invalidate the tax. However, where the tax is so unreasonable as to have no rational basis by way of its relation to the use or privilege granted, that tax must necessarily fail.

In *Standard Oil Co.* v. *Peck,* 342 U. S. 382, the doctrine of apportioning taxation was restated under the authority of *Ott* v. *Mississippi Valley Barge Line Co.,* 336 U. S. 169. Here, the tax was declared invalid upon the ground that it was not fairly apportioned to the commerce carried on within the State of Ohio, for the barges sought to be taxed by the State of Ohio were almost continuously outside of the State during the taxable year and hence,

could be taxed by the several states on an apportionment basis.

In *McCarroll* v. *Dixie-Greyhound Lines*, 309 U. S. 176, vehicles entering the state carrying fuel in their tanks for their own consumption were required to pay a tax of 6.5¢ per gallon on gasoline in excess of 20 gallons. The tax was held invalid upon the ground that the formula bore no reasonable relation to the use. Mr. Justice Brandeis, speaking for the court, at page 181, stated:

> "It must appear upon the face of the Statute that the tax as laid is measured by or has some fair relationship to the use of the highway for which the charge is made."

CONCLUSION.

In conclusion we respectfully submit that the Supreme Court of Illinois has in effect held by its decision that the well established precedents that a tax must bear a relationship to the use granted is unnecessary, since the factor of reasonableness is only important as it bears relation to the total revenue; that differences in classes as well as the type of operation are unimportant; and indiscriminate and oppressive taxation without regard to these factors is judicially sanctioned.

The decision of the Supreme Court of Illinois, if permitted to stand, will grant administrative officers the exclusive right of imposing or refusing to impose taxes upon certain interstate and intrastate carriers, by their determination of what area shall constitute "within a close radius".

It is, therefore, respectfully submitted that this court should reverse the decision of the Supreme Court of Illinois and sustain the findings of the Circuit Court of Sanga-

mon County, Illinois, declaring the 1951 Amendment to the Motor Vehicle Law of Illinois unconstitutional.

Respectfully submitted,

SCOTT W. LUCAS,
CHARLES A. THOMAS,
JACK ARNOLD WELFELD,
Counsel for Appellants.

HUGH J. GRAHAM, JR.,
Of Counsel.